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Supreme Court of the United States

OCTOBER TERM, 1997

OHIO ADULT PAROLE AUTHORITY, et al.,

Petitioners,

vs.

EUGENE WOODARD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF RESPONDENT

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BRIEF *AMICUS CURIAE* OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICUS CURIAE*

The American Bar Association ("ABA") submits this brief as *amicus curiae*[1] pursuant to Rule 37.3 of the Rules of the Supreme Court, to provide the Court its perspective

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[1] Rule 37.6 Statement: This brief was written entirely by counsel for *amicus*, as listed on the cover. No outside contributions were made to the preparation or submission of this brief. Both parties have given written consent to the filing of this brief.

regarding one aspect of this case, *i.e.*, how the interrelated roles which postconviction and clemency counsel are expected to perform should influence the Court's determination of the appropriate due process test to apply.

The ABA[2] is a voluntary, national membership organization of the legal profession. Its more than 392,000 members, from each state, territory and the District of Columbia, include prosecutors, public defenders, private lawyers, trial and appellate judges from the state and federal courts, legislators, law professors, law enforcement and corrections personnel, law students and a number of "non-lawyer" associates in allied fields. Since its inception more than a century ago, the ABA has taken an active interest in promoting the availability of counsel as a crucial element in ensuring fundamental fairness in our adversary system of criminal justice.

The ABA has taken no position regarding the constitutionality of the death penalty. However, the ABA has been working to ensure that the death penalty is not imposed without the most careful consideration and full compliance with defendants' constitutional and legal rights. To this end, the ABA initiated in 1986 a Death Penalty Post-Conviction Representation Project. The project attempts, *inter alia*, to locate volunteer counsel to represent death row inmates in postconviction, federal habeas corpus and clemency proceedings, although the ABA has not adopted a policy regarding

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2 Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the position in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

the necessity of clemency proceedings. Many ABA members have participated as counsel in clemency proceedings. Accordingly, the ABA believes it can provide the Court with some important perspectives regarding the role that counsel for a death row inmate is expected to play in a clemency proceeding -- perspectives that should assist the Court in determining the appropriate due process test to apply.

The ABA's involvement with this subject includes its proposal in 1979 "that the United States Supreme Court adopt a rule providing for appointment of counsel to prepare petitions for discretionary review of state court convictions, including appropriate postconviction or clemency petitions if necessary, in death penalty cases where the defendant cannot afford to hire counsel."[3] In 1989, the ABA adopted Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases. One of these Guidelines, 11.9.4, is entitled "Duties of Clemency Counsel" and is quoted at page 10 *infra*.[4]

SUMMARY OF ARGUMENT

Because Respondent already has postconviction counsel, the issue here is not whether counsel needs to be appointed. Rather, the issue that the ABA will address is the appropriate due process test to apply. It will do so by discussing the duties of postconviction and clemency counsel,

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3 Resolution 102B, approved by ABA House of Delegates at 1979 Midyear Meeting. Should the Court be interested, the ABA would be pleased to provide the Clerk of the Court with a copy of Resolution 102B and the other sources cited in this brief.

4 Resolution 122, approved by ABA House of Delegates at 1989 Midyear Meeting.

and the way in which the expectation of performance of those duties bears on due process.

As the court below recognized, "[t]he degree to which each component" of an overall adjudicative system "forms 'an integral part' of the overall adjudicative system determines the degree to which due process plays a role." *Woodard v. Ohio Adult Parole Authority*, 107 F.3d 1178, 1186 (6th Cir. 1997) (citation omitted). This is so because "'the introduction of a second tier of adjudication unavoidably affects the operation and significance of the first tier.'" *Id., quoting United States v. Smith*, 94 F.3d 204, 207 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 997 (1997).

Here, the State has created a state postconviction process in which counsel may actively represent a death row inmate, as Respondent's counsel is doing. The State also has created a clemency process, in which the State anticipates that counsel handling the postconviction proceeding will play some role. In this context, that which transpires prior to (or after) the clemency process is inevitably affected by the existence of that process, and *vice versa*. The ABA has a unique perspective regarding the clemency process and its interrelationship with the postconviction process because the ABA has studied and reviewed, and its House of Delegates has debated and approved, guidelines for clemency counsel which presuppose that the clemency process is interrelated with the postconviction process, as occurs in Ohio. Counsel should be expected to perform in accordance with these ABA guidelines, which recognize overlapping but different functions for counsel in the postconviction and clemency proceedings.

Under these circumstances, the due process considerations articulated in such cases as *Evitts v. Lucey*, 469 U.S. 387 (1985), and *Morrissey v. Brewer*, 408 U.S. 471 (1972), should be applied. Applying a modicum of due process to the clemency process, as well as to other stages in capital

cases, will help ensure that counsel are permitted to play the important roles they are expected to play under the ABA's guidelines in every stage of the proceedings. That will enable clemency proceedings to perform the critical role stressed by the Court in *Herrera v. Collins*, 506 U.S. 390, 411-17 (1993).

Clemency hearings provide an opportunity for consideration, in a different context, of information presented at trial, but also for consideration for the first time of the merits of additional information about the death row inmate that was not offered at trial. Such information, even if originally presented in postconviction or federal habeas corpus proceedings without leading to relief therein, nevertheless can appropriately influence the clemency decision. In postconviction or habeas proceedings, such information is considered only in support of a constitutional claim, such as ineffective assistance of counsel, whereas in a clemency proceeding it can be considered in determining whether the death row inmate will be put to death.

One type of evidence that accordingly may be presented in a clemency proceeding without having been presented at trial is newly discovered evidence of the death row inmate's actual innocence of the crime. Similarly, a death row inmate seeking clemency may present important mitigating evidence that, although uncovered during postconviction proceedings, was presented therein solely with respect to trial counsel's performance, not for a determination of whether the inmate should be allowed to live. A third type of evidence that may be presented in a clemency proceeding without having been presented at trial is evidence that the inmate has adjusted to imprisonment and perhaps matured and behaved in an exemplary manner while on death row. Clemency counsel is uniquely able to investigate, develop and present all of these kinds of evidence in a thorough, accurate and reliable manner.

Counsel's participation at the clemency hearing also is vital in order to provide the death row inmate with a meaningful opportunity to respond to statements made at the hearing by the prosecutor, the judge, the victim's survivors, or other prosecution witnesses, all of whom Ohio's parole board may permit to appear at the hearing. For example, those opposing clemency may misstate important facts about the inmate's background. Counsel for the inmate, who typically has great familiarity with the trial record and postconviction investigation, is uniquely situated to provide accurate information in response. It is therefore imperative that clemency counsel be permitted to play an active role in the clemency proceeding.

ARGUMENT

I. THE INTEGRAL AND INTERRELATED ROLE PLAYED BY POSTCONVICTION AND CLEMENCY COUNSEL IS RELEVANT TO THIS COURT'S CHOICE OF THE APPROPRIATE DUE PROCESS TEST

Mr. Woodard has counsel for his postconviction proceeding, in which the Ohio courts will not preclude counsel from functioning in accordance with the ABA's guideline setting forth the duties of postconviction counsel.[5] His postconviction counsel wishes to represent him in the clemency proceeding as well, apparently without further appointment. Ohio's parole board evidently contemplates that Mr. Woodard's postconviction counsel will play *some* role in the clemency proceeding, because the parole board notified Mr. Woodard's postconviction counsel of the date of the clemency hearing. Thus, this case does not present an issue

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[5] American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Guideline 11.9.3, at 27 (quoted *infra* at 19).

regarding Mr. Woodard's entitlement to have counsel appointed to represent him. Instead, Mr. Woodard's complaint alleges, in paragraphs 10-13, that his counsel would not be permitted to play a meaningful role in the clemency process because counsel would not have a reasonable amount of time to prepare an application for clemency and would not be entitled to be present at the clemency hearing or to present documentary evidence therein.[6]

Amicus believes that when the Court decides what due process analysis to apply to these allegations, the Court should take into account the expected role of counsel in clemency proceedings and postconviction proceedings. In this connection, Ohio's decision to establish a clemency process means that the availability of that process will inevitably affect, and be affected by, the availability of other processes. One of these processes is the state postconviction proceeding, in which Mr. Woodard is represented by the same counsel who also wish to actively participate on his behalf in the clemency proceeding. In part II, *infra*, *amicus* will discuss in detail the ABA guidelines which set forth what counsel is expected to do in representing a death row inmate in a clemency proceeding. At this juncture, *amicus* merely points out that these guidelines exist, and that they are related to other ABA guidelines that set forth counsel's duties in other stages of the proceedings that may end in an execution. The ABA, in adopting these guidelines, presupposed that these various proceedings, including clemency proceedings, would exist and believed that counsel should be permitted to play an active role in each of them. Accordingly, counsel represent-

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[6] The ABA recognizes that the Sixth Circuit had ordered the case remanded in order to achieve a better understanding of the specific facts about Ohio's procedures. In this brief, the ABA addresses, in the context of the facts as alleged in the complaint, basic principles regarding the functioning of counsel in any capital clemency proceeding.

ing Mr. Woodard in the state postconviction proceeding should expect to follow the ABA's guidelines in both the postconviction and the clemency proceedings.

Thus, the State's decision to have a clemency process, and its decision to have a postconviction process in which counsel are permitted to actively represent a death row inmate, are interrelated. Counsel's expectations of what counsel is expected to do in the postconviction proceeding inevitably is affected by knowledge of the existence of the clemency proceeding.

Under these circumstances, the existence of the clemency proceeding has constitutional implications, much as does the existence of the direct appeal. As this Court said in *Evitts v. Lucey*, 469 U.S. 387 (1985):

> [I]f a State has created appellate courts as "an integral part of the * * * system for finally adjudicating the guilt or innocence of a defendant", the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution.

Id. at 393 (*quoting Griffin v. Illinois*, 351 U.S. 12, 18 (1956)). The court below aptly noted why this is so:

> * * * the enactment of an appellate system necessarily "alter[s] the balance between the layers of adjudication in a constitutionally significant manner". * * * That is, the introduction of a second tier of adjudication unavoidably affects the operation and significance of the first tier. For this reason, due process places constraints on an appeal even if it does not require an appeal in the first place. The appeal forms an "integral" and inextricable part of the procedures for determining whether a defendant should be deprived of his life, liberty, or property.

Woodard v. Ohio Adult Parole Authority, 107 F.3d 1178, 1186 (6th Cir. 1997), *quoting United States v. Smith*, 94 F.3d 204, 207 (6th Cir. 1996) (citation omitted), *cert. denied*, 117 S. Ct. 997 (1997).

Amicus agrees with the Sixth Circuit that these considerations also apply to clemency proceedings, albeit with somewhat less force than with regard to direct appeals. *See id.* at 1186-87. Certainly, the existence of clemency inevitably has ripple effects on the postconviction proceeding; and what counsel is expected to do in each proceeding is unavoidably affected by what counsel is expected to do in the other proceeding.

II. CLEMENCY COUNSEL HAS MANY ESSENTIAL DUTIES, WHICH ARE INTERRELATED WITH THE DUTIES OF POSTCONVICTION COUNSEL

A. Clemency Counsel Must Be Permitted To Perform Several Essential Duties

The ABA has considered carefully the functions that counsel for an inmate seeking clemency must perform. The ABA believes that clemency counsel should be expected to perform each of these functions, which are described below.

1. The ABA Has Specified What These Essential Duties Are

The ABA's Guideline 11.9.4 sets forth the following Duties of Clemency Counsel:

> A. Clemency counsel should be familiar with the procedures for and permissible substantive content of a request for clemency.
>
> B. Clemency counsel should interview the client, and any prior attorneys if possible, and conduct an investigation to discover information relevant to the clemency procedure applicable in the jurisdiction.
>
> C. Clemency counsel should take appropriate steps to ensure that clemency is sought in as timely and persuasive a manner as possible.

American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, at 28.

The official Commentary to Guideline 11.9.4 elucidates this Guideline, as follows:

> * * * Counsel should be familiar with the governor or other clemency-dispenser, and with the factors the clemency-dispenser has historically found persuasive. If doubts about the fairness of the judicial proceedings that

> produced the death sentence have led to clemency in other cases, counsel should consider whether particular instances of procedural unfairness can be set out as to the client's case (requiring a familiarity with the legal history of the case). If personal characteristics of the condemned have proven helpful in past clemency proceedings, then counsel should mobilize an especially detailed investigation to discover and demonstrate examples of the client's similar characteristics to the extent possible.

Id. at 147 (footnotes omitted).

2. In Carrying Out These Duties, Clemency Counsel Must Consider What Has Been Persuasive In Other Cases

Since Ohio's current clemency-dispenser has as yet neither granted nor irreversibly denied clemency for a death row inmate, an Ohio attorney attempting to act in accordance with Guideline 11.9.4 should consider carefully all the factors that might lead to a grant of clemency.

Accordingly, counsel should be mindful of clemency's various functions, which go well beyond the functions of courts. This Court has recognized that clemency can be, and often has been, granted on grounds on which the courts cannot grant relief. *See, e.g., Herrera v. Collins*, 506 U.S. 390, 411-17 (1993); *Gregg v. Georgia*, 428 U.S. 153, 199 n.50 (1976). As this Court recently stated, the clemency authority has the indispensable role of "preventing miscarriages of justice where judicial process has been exhausted." *Herrera*, 506 U.S. at 412 (footnote omitted). Thus, while evidence adjudged not to have been presented to the courts in

a timely manner may not provide a basis for judicial relief, even if it points towards a death row inmate's actual innocence, clemency is the "traditional remedy" for innocence claims based on newly discovered evidence. *Id.* at 416-17. Moreover, the clemency authority is free to grant relief when there are significant doubts regarding the death row inmate's guilt but not sufficient proof of actual innocence to satisfy the extremely high standards required for relief from courts. *See Carriger v. Stewart*, 95 F.3d 755, 761 (9th Cir. 1996) ("That the evidence against [the petitioner] is not overwhelming might well be considered * * * by the governor in exercising his power of executive clemency."). In addition, while the courts are not constitutionally required to determine if the penalty imposed in a particular capital case is disproportionate to the penalty imposed on a co-defendant or defendants in other capital cases, *see Pulley v. Harris*, 465 U.S. 37, 50-53 (1984), a clemency authority can grant clemency based on a desire to show that the State is providing even-handed justice. The clemency authority may also grant relief on the basis of mitigating factors that it finds persuasive, because clemency may be based on what Justice Cardozo described as "anything [that] is pertinent that may move the mind to doubt or the heart to charity." *Andrews v. Gardiner*, 121 N.E. 341, 343 (N.Y. 1918).

Each of the factors discussed above has led to clemency grants for death row inmates in other jurisdictions in recent years. An analysis published in 1993 shows that some of the reasons for grants of clemency to death row inmates in actual cases subsequent to *Furman v. Georgia*, 408 U.S. 238 (1972), have included: doubt about the death row inmate's guilt; the fact that equally culpable co-defendants received sentences less than death; mitigating factors, such as the inmate's mental problems; and the inmate's steps towards rehabilitation while on death row. *See* Michael L. Radelet & Barbara A. Zsembik, *Executive Clemency in Post-Furman Capital Cases*, 27 U. Rich. L. Rev. 289, 302-03 (1993).

3. Clemency Counsel Must Investigate And Submit Evidence That Should Have Been, But Was Not, Presented At Trial

In the cases summarized in the Radelet and Zsembik article, *supra*, clemency has been secured for other death row inmates on the basis not only of evidence presented at trial but also evidence that should have been introduced at trial, but was not. Accordingly, clemency counsel should investigate and consider offering evidence not contained in the trial record.

a. This Should Include Evidence Regarding Doubts As To Guilt, Comparative Culpability And Punishment, Remorse And Other Positive Actions While On Death Row

The additional evidence that clemency counsel should investigate and consider presenting should include evidence regarding guilt or innocence -- not only evidence that raises doubts about the inmate's guilt, but also that which sheds light on the degree of his criminal responsibility, and how it compares with that of others who did not receive the death sentence. It also should include evidence that while on death row, the inmate has exhibited remorse, has succeeded in becoming educated, or otherwise has made a positive adjustment to incarceration.

b. It Should Also Include Evidence Regarding Mitigating Factors Not Presented By Trial Counsel

Moreover, clemency counsel should investigate and consider presenting evidence of mitigating factors about

which the jury never heard. Such mitigating factors may include the following:

1. Medical history (including mental and physical illness or injury, alcohol and drug use, birth trauma and developmental delays);

2. Educational history (including achievement, performance and behavior, special educational needs including cognitive limitations and learning disabilities) and opportunity or lack thereof;

3. Military service, (including length and type of service, conduct, and special training);

4. Employment and training history (including skills and performance, and barriers to employability);

5. Family, and social history (including physical, sexual or emotional abuse, neighborhood surroundings and peer influence); and other cultural or religion influence, professional intervention (by medical personnel, social workers, law enforcement personnel, clergy or others) or lack thereof; prior correctional experience (including conduct on supervision and in institutions, education or training, and clinical services);

6. Rehabilitative potential of the client.

7. Record of prior offenses (adult and juvenile), especially where there is no record, a short record, or a record of non-violent offenses.

8. Expert testimony concerning any of the above and the resulting impact on the client, relating to the offense and to the client's potential * * *.

American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Guideline 11.8.6, at 25-26.

Evidence regarding such factors may not have been presented at a death row inmate's trial because, as the ABA has recognized, trial counsel may be inexperienced, and even "[e]xperienced criminal counsel familiar with sentencing practices in non-capital cases may not recognize the different form of advocacy required at a death penalty sentencing trial." *Id.* at 96, Commentary to Guideline 11.4.1; *id.* at 134, Commentary to Guideline 11.8.6 (footnote omitted). Indeed, the ABA concluded that its need for a guideline specifically requiring counsel to investigate these mitigation factors was "underscored by cases in which counsel failed to recognize the importance of this aspect of death penalty litigation." *Id.* at 96, Commentary to Guideline 11.4.1.

Accordingly, counsel representing a death row inmate in a clemency proceeding should investigate each kind of mitigating evidence, unless that counsel already has undertaken that investigation during the postconviction and federal habeas processes -- in which event, the prior investigation need only be updated. Counsel should carefully consider pre-

senting in the clemency proceeding all mitigating evidence that might be persuasive to the clemency authority.

c. This Broad Range Of Evidence May Persuade The Clemency Authority Even If It Did Not Suffice To Secure Postconviction Or Habeas Corpus Relief

The kinds of evidence discussed in parts a and b above may be persuasive in a clemency proceeding even if they have not sufficed to secure relief in a postconviction or federal habeas corpus proceeding. Whereas "[t]he judicial system has a difficult time dealing with these new evidence claims," there is no such limitation on a clemency authority. The latter can consider all possibly relevant evidence, whether or not it was originally before the sentencing jury, and whether or not trial counsel waived any legal claims by failing to present it at trial. *See* Bruce Ledewitz & Scott Staples, *The Role of Executive Clemency in Modern Death Penalty Cases*, 27 U. Rich. L. Rev. 227, 234-36 (1993).

Mitigation evidence that could have been, but was not, presented at trial provides a good example of information that may succeed in securing clemency even though it has not led to postconviction or habeas relief. Typically, when postconviction or habeas counsel provide evidence in mitigation that they assert should have been presented at trial, they do so in support of a claim of ineffective assistance of counsel. But under this Court's constitutional test for ineffectiveness, first enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984):

> The Constitution, as interpreted by the courts, does not require that the accused, even in a capital case, be represented by able or effective counsel. * * * Ineffectiveness is not measured against the standards set by good lawyers but by the average --"reasonableness under prevailing professional norms" * * *. Consequently, accused persons who are represented by "not-legally-ineffective" lawyers may be condemned to die when the same accused, if represented by *effective* counsel, would receive at least the clemency of a life sentence.

Riles v. McCotter, 799 F.2d 947, 955 (5th Cir. 1986) (Rubin, J., concurring) (citation to *Strickland* omitted) (emphasis in original). However, death row inmates such as those discussed in *Riles* might still receive "the clemency of a life sentence", *id.*, from the clemency authority even after losing their ineffectiveness claims in postconviction and habeas proceedings. "Indeed, clemency long predates sophisticated judicial sentencing procedures as a method for presenting mitigating information." *See* Deborah Leavy, Note, *A Matter of Life and Death: Due Process Protection in Capital Clemency Proceedings*, 90 Yale L.J. 889, 905 (1981) (footnotes omitted).

Similarly, evidence that the death row inmate is actually innocent may lead to clemency even though it does not lead to postconviction or federal habeas corpus relief. As the Court stated in *Herrera v. Collins*, 506 U.S. 390 (1993):

> Federal habeas review of state convictions has traditionally been limited to claims of constitutional violations occurring in the course of the underlying state criminal proceedings. Our federal habeas cases have treated claims of "actual innocence," not as an independent constitutional claim, but as a basis upon which a habeas petitioner may have an independent constitutional claim considered on the merits,

> even though his habeas petition would otherwise be regarded as successive or abusive. History shows that the traditional remedy for claims of innocence based on new evidence, discovered too late in the day to file a new trial motion, has been executive clemency.

Id. at 416-17.

4. Clemency Counsel Must Also Consider Presenting, In A New Light, Evidence That Was Introduced At Trial

A clemency proceeding presents not only the opportunity to provide the clemency authority with "[i]nformation not presented earlier because of inadequate counsel, strategic considerations, or the unavailability of witnesses." It also provides an opportunity for the clemency authority "to reconsider information previously applied to the case only in a judicial setting," which may now "be seen in a new light because of differences in the screening mechanisms." *See* Deborah Leavy, Note, *supra*, 90 Yale L.J. at 893-94 n.17. Accordingly, counsel for a death row inmate seeking clemency should consider presenting, in this new context, information that was previously introduced at trial.

B. These Duties Of Clemency Counsel Are Interrelated With The Duties Of Postconviction Counsel

The duties of clemency counsel, discussed in part A, *supra*, are interrelated with the duties of postconviction counsel. The ABA's expectations of what postconviction counsel will do are set forth in the ABA's Guideline 11.9.3, which provides as follows:

> A. Postconviction counsel should be familiar with all state and federal postconviction remedies available to the client.
>
> B. Postconviction counsel should interview the client, and previous counsel if possible, about the case. Counsel should consider conducting a full investigation of the case, relating to both the guilt/innocence and sentencing phases. Postconviction counsel should obtain and review a complete record of all court proceedings relevant to the case. With the consent of the client, postconviction counsel should obtain and review all prior counsel's file(s).
>
> C. Postconviction counsel should seek to present to the appropriate court or courts all arguably meritorious issues, including challenges to overly restrictive rules governing postconviction proceedings.

American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Guideline 11.9.3, at 27.

The interviews and investigation contemplated by part B of the ABA's Guideline 11.9.3 for postconviction counsel also are contemplated by Guideline 11.9.4 (quoted at page 10, *supra)* for clemency counsel. Where these steps already have been undertaken by postconviction counsel, they need only be updated by clemency counsel. Particularly where, as here, the same counsel representing the death row inmate in the clemency proceeding also has represented him in the

postconviction proceeding, little additional interviewing would be necessary for the clemency proceeding, provided that (unlike here) the postconviction work has already been completed.

A further interrelationship between postconviction counsel and clemency counsel is that the postconviction counsel should be fully cognizant of the procedural or other legal reasons that the inmate's claims were not successful in the postconviction proceeding. Where, as is often the case (see part A3c, *supra*), the claims failed in postconviction for reasons unrelated to their truth, it is vital that clemency counsel be prepared to bring this to the clemency-dispenser's attention so that clemency will not be denied based on a misimpression about the basis on which postconviction relief was denied.

Moreover, where postconviction counsel has not performed in accordance with the ABA's Guideline 11.9.3, this not only imposes additional investigatory duties upon clemency counsel. It also means that clemency counsel must be prepared to disabuse the clemency-dispenser of the notion that all the factual matters uncovered by the clemency counsel have already been carefully considered in the postconviction proceeding.

C. A State Representative Cannot Carry Out The Crucial Functions Of A Death Row Inmate's Counsel

As discussed in parts A3 and 4, *supra*, counsel for the death row inmate has a critical role to play in determining which previously presented information -- as well as which newly uncovered information -- might persuade the clemency authority to grant clemency, and in deciding which such information to actually present. This cannot be achieved by an investigator for the State, for the following reasons:

> When the state has responsibility for gathering information, institutional factors may prevent some information from being obtained. The applicant may not trust the state's investigator and may decline to reveal information that might otherwise be helpful to him. * * * Witnesses for the applicant may be intimidated by the state interviewer. * * * Moreover, the state investigator's role is distinct from that of an advocate for the applicant. * * *

Leavy, *supra,* 90 Yale L.J. at 900-01 n.61 (citations omitted). Not only is a State investigator far less likely than the death row inmate's counsel to ferret out evidence that could warrant clemency; but also, because of his institutional role, he cannot advocate on the inmate's behalf about the persuasiveness of that evidence.

Moreover, without the aid of counsel, the death row inmate "cannot correct or rebut information adverse to his application" presented by others. *Id.* at 901. The State, or even the victim's survivors, may, in opposing clemency, make misstatements about the death row inmate. When this occurs, it is crucial that counsel for the death row inmate have an opportunity during the clemency hearing to ensure that the clemency authority does not proceed on the basis of informational errors. *See id.* at 905.

III. A DUE PROCESS ANALYSIS BASED ON *EVITTS* AND SIMILAR CASES WILL BEST ENSURE THAT CLEMENCY COUNSEL WILL PLAY THEIR CRUCIAL ROLE

As shown in section I *supra*, it is important, in determining the appropriate due process analysis to apply here, to consider the roles that clemency and postconviction counsel are expected to play. In section II, *supra*, *amicus* has

discussed in detail the essential role which clemency counsel should be permitted to play, and has shown that this role is interrelated with the role that postconviction counsel is expected to play, and, indeed, with what counsel has done in every prior stage of the proceedings, beginning with the pretrial work of trial counsel. Under these circumstances, *amicus* believes the most appropriate due process analysis to apply is one that proceeds by analogy to *Evitts v. Lucey*, 469 U.S. 387 (1985), and other cases, such as *Morrissey v. Brewer*, 408 U.S. 471 (1972), which also deal with due process liberty interests that can be subject to judicial review. The due process principles applied in *Evitts* proceed from this Court's appreciation of the need to consider each and every "integral part of the * * * system for finally adjudicating" the defendant's fate. *See id.* at 393 (*quoting Griffin v. Illinois*, 351 U.S. 12, 18 (1956)). Here, as shown above, Ohio has chosen to make the clemency process an "integral part" of its adjudication of the fate of death row inmates, and the manner in which that process is carried out is interrelated with all the other adjudicatory proceedings.

As explained in depth in Respondent's brief, due process protections apply here because a defendant's interests in life and liberty require due process protections not only at the outset of criminal adjudicatory proceedings, but also until the conclusion of all adjudicatory proceedings intended to ensure that convictions and death sentences are reliable. The application of due process protections is particularly important in view of the critical nature of the clemency proceeding, as emphasized by the Court in *Herrera v. Collins*, 506 U.S. 390 (1993). In *Herrera*, the Court recognized that "[c]lemency * * * is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted." *Id.* at 411-12 (footnotes omitted). Indeed, the Court stressed that clemency is the "'fail safe' in our criminal justice system." *Id.* at 415 (*quoting* Kathleen D. Moore, *Pardons, Justice, Mercy and the Public Interest* 131 (1989)). For that "fail safe" to operate, it must be conducted in accordance with at least the due process contemplated by such cases as *Evitts*, *Morrissey*

v. Brewer, 408 U.S. at 481 (due process "calls for such procedural protections as the particular situation demands"), and *Gagnon v. Scarpelli*, 411 U.S. 778, 781-91 (1973) (applying due process to probation revocation).

The due process right involved here is significantly different from that asserted in *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458 (1981), a non-capital case. *Dumschat* concerned what occurred *following* the commutation proceeding, *i.e.*, whether the commutation decisionmaker was required, *after* making its decision, to explain its determination. *Dumschat* did not involve, as this case does, the clemency process itself and its integral connection to the other aspects of Ohio's adjudicatory system.

CONCLUSION

Because clemency is interrelated with other stages of the proceedings that determine whether a death row inmate will be put to death, the clemency proceeding should be conducted in accordance with the basic due process contemplated by such cases as *Evitts v. Lucey*, 469 U.S. 387 (1985), and *Morrissey v. Brewer*, 408 U.S. 471 (1972). This will help enable clemency to serve the vital purpose that this Court recognized in *Herrera v. Collins*, 506 U.S. 390 (1993).

To accord with due process, it is crucial that the death row inmate's counsel be permitted to participate meaningfully in the clemency proceeding, including the hearing that Ohio's parole board conducts. Only such participation of counsel can ensure that the clemency authority will receive the broad range of evidence which it is empowered to consider and which may, indeed, persuade it to show mercy. Moreover, only counsel's participation can ensure that any contrary evidence will be considered in a complete and reliable manner.

Respectfully submitted,

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